

**BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.**

Application of)

AVIOR AIRLINES, C.A.)

for an amended exemption pursuant)
to 49 U.S.C. § 40109)
_____)

Docket No. OST-2016-0170

**MOTION OF AVIOR AIRLINES, C.A.
FOR CONFIDENTIAL TREATMENT UNDER 14 C.F.R. § 302.12**

Communications with respect to the
above should be addressed to:

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DATED: June 24, 2021

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Avior Airlines, C.A. (“Avior Airlines”), pursuant to Rule 12 of the Department’s Rules of Practice, 14 C.F.R. § 302.12, hereby moves that the Department withhold from public disclosure certain proprietary and commercially sensitive confidential information Avior Airlines is submitting under seal in connection with the above captioned proceeding. Specifically, the confidential documents subject to this motion are being submitted in connection with Avior Airlines’ supplement to their application for an amended exemption. The confidential documents are identified and described in the attached index. Avior Airlines respectfully requests that access to these documents be limited to counsel and outside experts for interested parties.

In support of this motion, Avior Airlines states as follows:

I. THE CONFIDENTIAL INFORMATION IS PROTECTED FROM PUBLIC DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT

The confidential information being submitted by Avior Airlines is protected from public disclosure under various exemptions in the Freedom of Information Act, including 5 U.S.C. § 552(b)(3) and 5 U.S.C. § 552(b)(4).

Exemption (4) exempts from public disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4). This exemption has been construed to prevent public disclosure of information that is not the type usually released to the public, and that if released would cause substantial harm to the competitive position of the person from whom the information was obtained. See e.g., Gulf & Western Industries, Inc. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1980); American Airlines, Inc. v. NMB, 588 F.2d 863, 871 (2d Cir. 1978); National Parks & Conservation Ass’n v. Kieppe, 547 F.2d 673, 684 (D.C. Cir. 1976) Joint Application of Delta and Virgin Atlantic, Order 94-5-42, May 28 1994; Joint Application of United and Lufthansa, Order 93-12-32, December 18, 1993; Joint Application of Northwest and KLM, Order 93-1-11, January 8, 1993, p. 19; Information Directives Concerning CRS, Order 88-5-46, May 22, 1988; Carrier-Owned Computer Reservations Systems, ER-1385, Order 86-5-54, May 19, 1986; Information Directives Concerning CRS, Order 83-12-136, December 29, 1983. The purpose of these exemptions “is to protect the confidentiality of information which citizens provide to their government, but which would customarily not be released to the public, and to facilitate citizens’ ability to confide in their government.” Burke Energy Corp. v. DOE, 583 F. Supp. 507, 510 (D. Kan. 1984).

For information to qualify for exemption (4), the information must be (1) commercial or financial in nature, (2) obtained from a person, and (3) privileged or confidential. See Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983). All of the confidential information being submitted by Avior Airlines satisfies this three-part test.

First, the confidential information is commercial or financial in nature in that it relates to commercially sensitive, proprietary, and privileged financial and corporate information. This type of confidential information is proprietary and commercially sensitive, and would not otherwise be

made public. It is being submitted to the Department so that the Department can expeditiously evaluate whether Avior Airlines is financially qualified to provide the services at issue in its application.

Second, the information has been “obtained from a person” within the meaning of exemption (4).

Third, the information is “confidential.” This confidential information is not available to the public, and its public disclosure is not required to further the public interest or to promote competition. In National Parks & Conservation Ass’n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974), the Court held that information is “confidential” for purposes of exemption (4) if it would not customarily be released to the public by the person from whom it was obtained, and if disclosure is likely to have either of the following results: “(1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.”

Avior Airlines submits that public disclosure of the type of confidential information at issue here would cause substantial harm to its competitive position, and could impair the Government’s ability to obtain similar information on a voluntary basis from individuals in the future.

II. ACCESS TO THESE HIGHLY SENSITIVE DOCUMENTS SHOULD BE LIMITED TO COUNSEL AND OUTSIDE EXPERTS

Avior Airlines is submitting highly sensitive internal corporate documents and data which should be accorded limited access. Such access should be granted only to counsel and outside experts who file Rule 12 affidavits stating that the affiant will (1) use the information only for the purpose of participating in this proceeding, and (2) not disclose such information to anyone other

than counsel or outside experts who have filed a valid affidavit.

The subject materials contain highly sensitive commercial information relating to Avior Airlines' financial performance. The information contained in these documents has not been publicly released. If released, competitors would gain valuable insights into Avior Airlines' financial performance and other competitively sensitive matters.

In order to minimize the risk of harmful disclosure of this competitively sensitive information, access should be strictly limited, as requested. Avior Airlines is filing, concurrently with this motion, copies of this information, in sealed envelopes labeled "Confidential Treatment Requested Under 14 CFR 302.12; Access Is Limited To Counsel Or Outside Experts Who Have Filed Valid Affidavits."

The request to limit disclosure to counsel and outside experts is fully consistent with Department precedent and policy. Thus, in United/Lufthansa, Order 93-12-32, supra, the Department granted the applicants' request to limit access to certain confidential information to counsel and outside experts who filed Rule 39 (now Rule 12) affidavits. In so limiting such access, the Department balanced the disclosure of the confidential information against the competitive harm to the applicants that would result if access were expanded, and concluded that "the undue competitive harm to the applicants outweighs the commenters' need for expanded access to the highly sensitive material in this case" (p. 5). The Department also noted that "interested parties to this proceeding can obtain adequate advice on the merits of the application through outside experts and persons authorized to review the materials" (Id.). See also, e.g., Joint Application of American and Canadian International, Order 96-1-6, January 11, 1996, p. 3.

Access to Avior Airlines' internal documents and data should be limited in a comparable manner, in light of the undue competitive harm that would result from a broader disclosure of such

highly sensitive information.

CONCLUSION

The Department should grant this motion to withhold proprietary and commercially sensitive confidential information from public disclosure, as Avior Airlines has requested herein.

Dated: June 24, 2021

Respectfully submitted,



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INDEX OF DOCUMENTS SUBJECT
TO MOTION FOR CONFIDENTIAL TREATMENT

Exhibit 3.....Financial Statements